Zaini bin Hussin v Public Prosecutor and another appeal

HIGH COURT (TAWAU) — CRIMINAL APPEAL NOS TWU-42A AC-1/11 OF 2018 AND TWU-42A AC-2/11 OF 2018
ALWI ABDUL WAHAB J
2 AUGUST 2019

Criminal Procedure — Appeal against conviction and sentence — Appellant charged under ss 377E and 377C of Penal Code — Appellant convicted and sentenced — Whether safe to act on evidence of PW1 alone — Whether prosecution established charge against appellant beyond reasonable doubt — Whether conviction and sentence ought to be set aside — Penal Code ss 377C & 377E

These were two appeals by the appellant against his conviction and sentence given by the learned deputy registrar who sat in as sessions courts judge ('the SCJ'). In the first appeal, the appellant was appealing against his conviction and sentence of seven years imprisonment for the charge of inciting a child to an act of gross indecency which is an offence under s 377E of the Penal Code. In the second appeal, the appellant was appealing against his conviction and sentence of two charges both for an offence of voluntarily committing carnal intercourse against the order of nature under s 377C of the Penal Code. For the first charge, the appellant was sentenced to seven years imprisonments and two strokes of whipping. For the second charge the appellant was sentenced to ten years imprisonments to run consecutively with the first charge and two strokes of whipping.

Held, allowing both the appeals; setting aside the conviction and sentence by the SCJ; and discharging the appellant:

(1) When PW1 testified that the incident happened more than ten times, he meant the sodomy act as he was referred to the police report and not the offence with which the appellant was charged. PW1 was not being truthful when he earlier stated in his evidence that there was no one who had instructed him to give evidence the way he did but when asked which one was correct between his police report or the evidence he gave in court, he then admitted that it was the DPP who instructed him to give evidence of gross indecency and not sodomy. The conduct of the DPP if it was true as alleged would be prejudicial to the appellant as PW1's evidence was tutored and tampered with to suit the prosecution's case just because there was no evidence of sodomy upon examination carried out by the medical officer. PW4 never testified on the alleged act of the appellant as described in the charge. The medical report on the finding of

the doctor upon his examination of PW1 was not even tendered in court although PW4 testified that the medical report was available. On the issue of whether PW1 was threatened by the appellant, there was no evidence adduced by the prosecution as to where and when the threat was made. Although in case of sworn evidence by a child witness, corroboration was not required as it was only a matter of practice and prudence, in the circumstances of this case where the prosecution's case created so much doubt, it was unsafe to act on the evidence of PW1's alone (see paras 17, 20, 23, 25 & 29–30).

(2) There was no explanation on the inconsistency regarding the correct month and place of when and where both the incidents took place as stated in the police report and the two charges. PW2 testified that he was threatened by the appellant not to tell anyone of the alleged sodomy in the presence of his three friends who were also victims but none of them was called to testify. Those minor inconsistencies could be sometimes forgiven but in this second appeal there were big gaps in the prosecution case and the benefit of the doubts should be given to the appellant. Therefore, the allegation of sodomy against the appellant could not stand as it was tainted with doubts. The court could not ignore the impropriety of the trial court in refusing the request made by the appellant for a postponement in the absence of his counsel during defence case. It could not be said, therefore, the appellant had been properly defended by his lawyer of his choice when he gave evidence at the defence stage regardless of whether he agreed to proceed or otherwise in the absence of his counsel (see paras 39 & 49–52).

[Bahasa Malaysia summary

Ini adalah dua rayuan oleh perayu terhadap sabitan dan hukuman yang dijatuhkan oleh timbalan pendaftar yang bijaksana yang bersidang sebagai hakim mahkamah sesyen ('HMS'). Dalam rayuan pertama, perayu mengemukakan rayuan terhadap sabitan dan hukuman tujuh tahun penjara atas tuduhan merangsang seorang kanak-kanak untuk melakukan kelucahan melampau dengannya yang merupakan kesalahan di bawah s 377E Kanun Keseksaan. Dalam rayuan kedua, perayu mengemukakan rayuan terhadap sabitan dan hukuman dua pertuduhan atas kesalahan melakukan persetubuhan bertentangan dengan aturan tabii tanpa kerelaan di bawah s 377C Kanun Keseksaan. Bagi pertuduhan pertama, perayu dijatuhkan hukuman penjara tujuh tahun dan dua kali sebatan. Bagi pertuduhan kedua, perayu dijatuhkan hukuman penjara sepuluh tahun untuk dijalankan berturut-turut dengan pertuduhan pertama dan dua kali sebatan.

Diputuskan, membenarkan kedua-dua rayuan; mengenepikan sabitan dan hukuman oleh HMS; dan membebaskan perayu:

(1) Ketika PW1 memberi keterangan bahawa kejadian itu berlaku lebih

daripada sepuluh kali, dia bermaksud perbuatan liwat kerana dia dirujuk ke laporan polis dan bukan kesalahan yang dituduh oleh perayu. PW1 tidak bersikap jujur apabila sebelumnya menyatakan dalam keterangannya bahawa tidak ada orang yang menyuruhnya untuk memberikan keterangan seperti yang dilakukannya tetapi ketika ditanya mana yang benar antara laporan polisnya atau keterangan yang dia berikan di mahkamah, dia kemudian mengakui bahawa TPR yang memerintahkannya untuk memberikan keterangan kelucahan melampau dan bukan liwat. Tingkah laku TPR jika benar seperti yang didakwa akan memudaratkan perayu kerana keterangan PW1 diajar dan diganggu agar sesuai dengan kes pendakwaan hanya kerana tidak ada keterangan liwat semasa pemeriksaan dilakukan oleh pegawai perubatan. PW4 tidak pernah memberi keterangan mengenai tuduhan perbuatan perayu seperti yang dijelaskan dalam pertuduhan. Laporan perubatan mengenai penemuan doktor setelah pemeriksaan PW1 tidak ditender di mahkamah walaupun PW4 memberi keterangan bahawa laporan perubatan itu tersedia. Mengenai isu sama ada PW1 diancam oleh perayu, tidak ada keterangan yang dikemukakan oleh pihak pendakwaan tentang di mana dan bila ancaman itu dibuat. Walaupun dalam kes keterangan bersumpah oleh saksi kanak-kanak, sokongan tidak diperlukan kerana ia hanya soal praktik dan kecermatan, dalam keadaan kes ini di mana kes pendakwaan menimbulkan begitu banyak keraguan, tidak selamat untuk bertindak berdasarkan keteranagn PW1 sahaja (lihat perenggan 17, 20, 23, 25 & 29–30).

(2) Tidak ada penjelasan mengenai percanggahan mengenai bulan dan tempat yang tepat bila dan di mana kedua-dua kejadian itu berlaku seperti yang dinyatakan dalam laporan polis dan kedua tuduhan tersebut. PW2 memberi keterangan bahawa dia diancam oleh perayu untuk tidak memberitahu siapa pun mengenai tuduhan meliwat di hadapan tiga rakannya yang juga menjadi mangsa tetapi tidak seorang pun dari mereka dipanggil untuk memberi keterangan. Percanggahan kecil itu kadang-kadang dapat dimaafkan tetapi dalam rayuan kedua ini terdapat jurang besar dalam kes pendakwaan dan manfaat keraguan harus diberikan kepada perayu. Oleh itu, tuduhan meliwat terhadap perayu tidak dapat bertahan kerana dicemari keraguan. Mahkamah tidak dapat mengabaikan ketidakadilan mahkamah bicara dalam menolak permintaan yang dibuat oleh perayu untuk penundaan tanpa kehadiran peguamnya ketika kes pembelaan. Oleh itu, tidak dapat dikatakan, perayu telah dibela oleh peguamnya pilihannya dengan tepat ketika dia memberikan keterangan di peringkat pembelaan tanpa menghiraukan sama ada dia bersetuju untuk meneruskan atau sebaliknya dengan ketiadaan peguamnya (lihat perenggan 39 & 49–52).]

Cases referred to

Sidek bin Ludan v PP [1995] 3 MLJ 178, HC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Penal Code ss 377C, 377E

Datu Baginda bin Laja (Azman Baginda & Co) for the appellant.
Hurman Hussain (Wan Muhammad Fitri bin Wan Azizan with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.

Alwi Abdul Wahab J:

INTRODUCTION

[1] There are two appeals before this court by the appellant/accused against his conviction and sentence given by the learned deputy registrar who sits in as sessions courts judge ('SCJ'). The first appeal is TWU-42A AC-1/11 of 2018 (originating from Sessions Court Criminal Case No SEM-62JSK-4/12 of 2017) and the second appeal is TWU-42A AC-2/11 of 2018 (originating from Sessions Court Criminal Case No SEM-62JSK-2/12 of 2017). For convenience, the two appeals are hereinafter referred to as the first and second appeal respectively.

[2] In the first appeal, the appellant is appealing against his conviction and sentence of seven years imprisonment for the charge of inciting a child to an act of gross indecency which is an offence under s 377E of the Penal Code.

[3] In the second appeal, the appellant is appealing against his conviction and sentence of two charges both for an offence of voluntarily committing carnal intercourse against the order of nature under s 377C of the Penal Code. For the first charge, the appellant was sentenced to seven years imprisonments and two strokes of whipping. For the second charge the appellant was sentenced to ten years imprisonments to run consecutively with the first charge and two strokes of whipping.

[4] Both the first and second appeals were heard together by this court in a single sitting.

[5] On 2 August 2019, having heard the submissions from both sides, I allowed the appellant's appeal in both the first and second appeal. In other words, the conviction and sentence given by the learned SCJ are set aside.

[6] Dissatisfied against my decision in both the appeals, the learned deputy

public prosecutor ('DPP') filed an appeal to the Court of Appeal.

[7] I shall now give my grounds of decision.

TWU-42A AC-1/11 OF 2018 (THE FIRST APPEAL)

[8] The first appeal involves a child victim aged 11 years who testified against the appellant for inciting him to an act of gross indecency, an offence under s 377E of the Penal Code. The charge against the appellant as amended is as follows:

> Bahawa kamu, pada sekitar Oktober 2016, jam lebih kurang 12.00 malam, bertempat di rumah tidak bernombor Kampung Hujung Airport Semporna, di dalam Daerah Semporna, di dalam Negeri Sabah, telah merangsang seorang kanak-kanak bernama xxxxxx (MYKAD: xxxxxxxxxxxx) untuk melakukan suatu perbuatan kelucahan melampau, yang mana kamu telah menggesel-gesel kemaluan kamu dengan kemaluan mangsa bernama xxxxxx (MYKAD: xxxxxxxxxxxx), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 377E Kanun Keseksaan.

[9] The child victim who gave sworn evidence as PW1 had earlier on lodged a police report exh P2 dated 15 December 2016 stating that he was sodomised by the appellant at the appellant's house sometime in October 2016 at 12pm. The appellant is an *ustaz* teaching at Sekolah Agama Tun Sakaran, Semporna, Sabah.

[10] Due to the importance of exh P2 which has some bearing in the determination of this case, its contents is reproduced in verbatim:

> PADA BULAN OKTOBER 2016 LEBIH KURANG JAM 12.00 MALAM BERTEMPAT DI RUMAH JALAN AIRPORT LAMA SEMPORNA SEMASA SAYA SEDANG BARING DI BILIK USTAZ ZAINI TIBA-TIBA USTAZ ZAINI DATANG DAN BARING DIBELAKANG SAYA SAN MEMBUKA SELUAR SAYA LALU MEMASUKKAN KEMALUANNYA KEDALAM DUBUR SAYA. SAYA TIDAK DAPAT BERBUAT APA-APA KERANA TAKUT DIMARAHI OLEH USTAZ ZAINI. KEJADIAN SEBEGINI SUDAH BANYAK KALI BERLAKU DAN USTAZ ZAINI JUGA ADA MENGUGUT MAHU MEMBUNUH SEKIRANYA SAYA MEMAKLUMKAN PERKARA INI KEPADA ORANG TUA SAYA. SAYA TAMPIL KE BALAI POLIS MEMBUAT LAPORAN MAKLUMAN DAN TINDAKAN SELANJUTNYA. SEKAIN LAPORAN SAYA.

[11] Acting on the above police report exh P2 by PW1, Insp Hasdiyanti bt Kasdi ie the investigating officer of the case ('PW4') had commenced the investigations into the alleged complaint. The next day, she brought PW1 to Tawau Hospital for medical check-up and examination by the medial officer.

[12] From the evidence of PW1 and PW4, both testified that upon the examination by the medical officer, there was no tear detected on PW1's anus which suggests that there was no penetration to constitute an act of sodomy, the reason why the appellant was not charged for sodomy but for inciting a child victim to an act of gross indecency instead.

[13] In the present case, there was no eye witness and the only evidence adduced by the prosecution was through PW1 who alleged that the appellant had inciting an act of gross indecency as described in the charge departing from the original complaint made by PW1 in his police report exh P2.

[14] The evidence of PW1 against the appellant:

> Q: adik juga nyatakan kepada mahkamah lepas Ustaz buka seluar adik dia memasukkan kemaluannya dalam dubur adik, apa yang adik maksudkan ini?
>
> A: dia gesel-gesel buyungnya itu pergi pantat saya.
>
> Q: selain dari pantat?
>
> A: sama dekat buyung saya.
>
> Q: bagaimana adik tahu yang digeselkan kepada pantat dan buyung adik itu adalah buyung Ustaz Zaini?
>
> A: sebab dia saja yang ada dalam bilik itu.
>
> (p 15 lines 3–20 of the notes of proceedings)

[15] When showed the photograph of the place of the incident, PW1 said that he was raped and when he was asked further what he meant by that, he said like he was being sexually harassed. PW1 testified:

> Q: gambar kelima?
>
> A: dekat tempat saya dirogol.
>
> Q: rogol itu maksud kamu apa?
>
> A: macam dicabul.
>
> (p 19 lines 8–12 of the notes of proceedings)

[16] PW1 was then referred to his police report exh P2 wherein he stated that it happened many times and he was asked further how many times exactly it happened, he answered ten times which he could not remember when it was first started. PW1 testified:

> Q: adik nyatakan dalam report adik yang kejadian sebegini sudah banyak kali berlaku. Boleh adik nyatakan kepada mahkamah berapa kali sebenarnya kejadian sama berlaku pada adik?

A: lebih dari 10 kali.

Q: sejak tahun bila itu kalau adik ingat?

A: tidak ingat.

(p 20 lines 7–13 of the notes of proceedings)

[17] It is clear from the above evidence, when PW1 testified that the incident happened more than ten times, he meant the sodomy act as he was referred to the police report and not the offence with which the appellant was charged.

[18] In cross-examination, PW1 testified that he did not give the evidence on the alleged offence of sodomy at the trial because he was so instructed by the learned DPP (who conducting the trial in sessions court) and also because of there was a finding by the doctor that there was no sign of injury on his anus. PW1 testified:

Q: apa doktor cakap sama kamu?

A: doktor tidak bagitau sama saya, dia bagitau sama polis yang ini tiada kesan koyakan.

Q: mana satu betul, laporan kamukah atau gesel-gesel?

A: tapi bilang abang itu tidak payah kasi masuk sebab tiada kesan koyakan.

Q: siapa yang suruh?

A: abang itu (witness pointing to the DPP).

Q: jadi kalau saya cakap gesel itu tidak pernah berlaku?

A: pernah berlaku.

Q: kenapa kamu disuruh cakap benda lain dengan laporan kamu di mahkamah pada hari ini?

A: sebab bilang abang itu tidak payah cakap kasi masuk.

Q: Sebab tiada laporan doctor?

A: Ya.

(p 24 lines 3–22 of the Notes of proceedings)

[19] Earlier on PW1 testified when asked why he did not state in his police report regarding the alleged act of inciting gross indecency by the appellant and he answered as follows:

Q: tengok laporan polis. Kenapa dalam laporan polis kamu tidak sebut yang Ustaz cuma gesel buyung dia dengan buyung kamu?

A: sebab yang dia kasi masuk ke dalam ini tiada kesan koyakan jadi dia kasi gesel gesel sajalah

Q: siapa yang cakap suruh buat begitu?

A: tiada.

(p 23 lines 10–16 of the Notes of proceedings)

[20] It must be noted that PW1 is not being truthful when he earlier stated in his evidence that there was no one who had instructed him to give evidence the way he did but when asked which one is correct between his police report or the evidence he gave in court, he then admitted that it was the DPP who instructed him to give evidence of gross indecency and not sodomy. The conduct of the DPP if it was true as alleged would be prejudicial to the appellant as PW1's evidence was tutored and tampered with to suit the prosecution's case just because there was no evidence of sodomy upon examination carried out by the medical officer.

[21] If indeed there was any truth in the allegation made against the appellant as per the charge, PW1 would have informed the police in his police report that he was incited by the appellant to an act of gross indecency and likewise he would have informed PW4 when his statement was recorded by PW4 at the earliest opportunity.

[22] Further, PW4's investigation was also centred on the offence of sodomy or attempted sodomy when she testified:

Q: berdasarkan siasatan kamu apa hasil siasatan?

A: hasil siasatan berdasarkan laporan doktor yang mulanya pengadu kata dia diliwat namun hasil pemeriksaan doktor tiada koyakan terhadap dubur pengadu. Dan hanya berdasarkan pengadu hanya terdapat macam gesel kemaluan terhadap dubur pengadu.

Q: maksudnya?

A: dia masukkan tapi mungkin tidak masuk sebab doktor cakap tiada koyakan, tetapi pengadu ada menyatakan cuba untuk masukkan. Gesel lah.

Q: jadi perbuatan yang benar-benar berlaku tertuduh buat ke atas pengadu apa perbuatannya?

A: merangsang pengadu untuk melakukan seks.

Q: boleh kamu terangkan apa yang kamu maksudkan dengan merangsang?

A: tertuduh seolah-olah ingin melakukan liwat terhadap pengadu.

Q: seolah-olah, maksud kamu?

A: Benda memang berlaku tapi tidak dapat dibuktikan yang kemaluannya masuk dalam dubur pengadu.

Q: jadi perbuatan sebenarnya berlaku?

A: merangsang.

Q: merangsang terlalu general, apa maksud kamu?

A: Saya susah mahu cakap. Tertuduh dia menggesel-gesel kemaluannya ke lubang dubur pengadu, so bagi saya itu adalah merangsang pengadu untuk melakukan seks.

(p 51 lines 5–22 and p 52 lines 2–10 of the notes of proceedings)

[23] From the above evidence, it must be noted that PW4 never testified on the alleged act of the appellant as described in the charge which states 'yang mana kamu telah menggesel-gesel kemaluan kamu dengan kemaluan mangsa'. Ironically, PW4 understanding of the word 'kemaluan' is not consistent when she described PW1's anus as his private part:

Q: kemaluan tertuduh kamu maksudnya?

A: dia punya alat sulit tempat keluarkan air kencing.

Q: dan kemaluan mangsa?

A: dubur bahagian belakang

(p 52 lines 14–18 of the notes of proceedings)

[24] Further, PW4 testified that PW1 in his medical report stated that the appellant had inserted his private part into PW1's anus but the doctor in his recorded statement stated that there was no tear which means there was no blunt object that was inserted into PW1's anus contrary to what was claimed by PW1. PW4 testified:

Q: berdasarkan laporan perubatan mangsa, mangsa menyatakan tertuduh memasukkan kemaluannya ke dalam dubur mangsa, namun selepas pemeriksaan perubatan dilakukan tiada kesan koyakan. Berdasarkan siasatan penuh kamu nyatakan kenapa perkara ini terjadi?

A: saya ada ambil rakaman percakapan doktor, doktor katakan yang pengadu tidak terdapat koyakan, maksudnya tiada benda tumpul yang masuk ke dalam dubur mangsa seperti dikatakan oleh mangsa.

(p 52 lines 20–22 and p 53 lines 1–6 of the notes of proceedings)

[25] And again, if indeed there was any truth in the allegation made by PW1 against the appellant as per exh P2 that he was sodomised for more than ten times, there must have been some trace of scar or tear that could be found on PW1's anus bearing in mind of the softness and tenderness of the affected area. This medical report on the finding of the doctor upon his examination of PW1 was not even tendered in court although PW4 testified that the medical report is available.

[26] On how many times that PW1 was sodomised, PW4 gave contradictory evidence when she testified that PW1 complained to her that he was sodomised once and the rest were just mere attempts. PW4 testified:

> Q: tadi kamu ada katakan bahawa pertuduhan hari ini adalah merangsang perbuatan seks yang melampau. Dan FIR iaitu laporan awal mangsa mengatakan dia diliwat oleh OKT. Dan kamu ada membawa mangsa ke hospital untuk mendapatkan pemeriksaan atau laporan doktor dan berdasarkan laporan doctor tidak ada kesan koyakan pada dubur mangsa. Setuju saya katakan mangsa tidak berkata benar dalam laporan polisnya yang mengatakan beliau diliwat oleh OKT dengan memasukkan zakarnya dalam dubur mangsa?
>
> A: tidak setuju.
>
> Q: kenapa?
>
> A: sebab pengadu ada beritahu tertuduh hanya melakukan dengan dia sekali saja, maksudnya cubaan untuk masukkan ke dalam dubur pengadu sekali saja.
>
> Q: adakah dalam siasatan kamu terhadap mangsa perbuatan meliwat atau percubaan meliwat berapa kali?
>
> A: sekali sahaja
>
> Q: tapi jika rujuk P2, mangsa mengatakan banyak kali berlaku?
>
> A: saya rakam percakapan pengadu pengadu beritahu sekali saja dia diliwat tapi yang lain itu cubaan saja
>
> (p 54 lines 10–21 and p 55 lines 1–11 of the notes of proceedings)

[27] The courts generally accepted the evidence by child witnesses subject to some caveats in regards to the value of their evidence.

[28] Where a child gives sworn testimony, corroboration is not mandatory, but the court must take into account the need to scrutinise his or her evidence with special care due to a child's tendency of inventing and distorting the story. The court must also warn itself of the dangers of convicting on such uncorroborated evidence of a child witness (*Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178; *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174*)*.

[29] On the issue of whether PW1 was threatened by the appellant as alleged in the police report exh P2, there was no evidence adduced by the prosecution as to where and when the threat was made.

[30] Although in case of sworn evidence by a child witness, corroboration is not required as it is only a matter of practice and prudence, in the circumstances of this case where the prosecution's case creates so much doubt, it is unsafe to act on the evidence of PW1's alone.

[31] In the light of the above, the appellant's appeal in this first appeal is allowed. The conviction and sentencing by the learned deputy registrar sitting as a sessions court judge are therefore set aside.

TWU-42A AC-2/11 OF 2018 (THE SECOND APPEAL)

[32] Moving on to the second appeal arising from two charges against the appellant. The victim here also a boy aged 11 years who testified against the appellant for alleged sodomy which happened in March and October 2016 at two different locations.

[33] The first charge which was allegedly took place in March 2016 is as follows:

> Bahawa kamu, pada sekitar bulan 3, 2016, jam lebih kurang 7.00 malam sehingga 12.00 malam, bertempat di rumah tidak bernombor Kg Hujung Airport, di dalam Daerah Semporna, di dalam Negeri Sabah, telah melakukan liwat terhadap seorang kanak-kanak bernama xxxxxx (MYKAD : xxxxxxxxxxxx) yang mana kamu telah memasukkan kemaluan kamu ke dalam punggung xxxxxx (MYKAD : xxxxxxxxxxxx) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 377C Kanun Keseksaan.

[34] The second charge which was allegedly took place in October 2016 is as follows:

> Bahawa kamu, pada sekitar bulan 10 2016, jam lebih kurang 7.00 malam sehingga 12.00 malam, bertempat di Kelas 1 Handbali Sekolah Agama Tun Sakaran, di dalam Daerah Semporna, di dalam Negeri Sabah, telah melakukan liwat terhadap seorang kanak-kanak bernama xxxxxx (MYKAD : xxxxxxxxxxxx) yang mana kamu telah memasukkan kemaluan kamu ke dalam punggung xxxxxx (MYKAD : xxxxxxxxxxxx) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 377C Kanun Keseksaan.

[35] Interestingly, the prosecution of this case also culminated from the police report (exh P2) lodged by the child victim who testified as PW2 in this second appeal. The contents of exh P2 is more or less similar to the contents of the police report of the child victim in the first appeal and both were lodged on the same date. Exhibit P2 stated as follows:

> Pada bulan Oktober 2016 lebih kurang jam 10.00 malam bertempat di dalam rumah Jalan Airport Semporna Lama didalam bilik Ustaz Zaini semasa saya sedang baring di bilik Ustaz Zaini tiba-tiba Ustaz Zaini datang dan baring dibelakang saya dan membuka seluar saya lalu memasukkan kemaluannya kedalam dubur saya. Saya cuba menghalang perbuatan Ustaz Zaini tetapi saya telah dipeluk dengan kuat dan tidak dapat berbuat apa-apa. Kejadian ini sudah banyak kali berlaku dan Ustaz Zaini juga ada memberi amaran kepada saya supaya tidak memberitahu sesiapa. Saya sangat bimbang dan trauma dengan perbuatan Ustaz Zaini dan saya telah

memaklumkan perkara tersebut kepada ibu dan bapa saya. Saya bersama ibu dan bapa tampil ke Balai Polis membuat laporan makluman dan tindakan selanjutnya. Sekian laporan saya.

[36] In the police report exh P2, it was alleged that PW2 was sodomised by the appellant in October 2016 at the appellant's house ie at Jalan Airport Semporna.

[37] However, the charge against the appellant (second charge) stated the alleged sodomy in October 2016 was said to happen in school ie Kelas 1 Handbali Sekolah Agama Tun Sakaran and not at the appellant's house.

[38] Further, contrary to the police report exh P2, the alleged sodomy at the appellant's house was said to occur in March 2016 (first charge) and not in October 2016.

[39] Having read through the notes of proceeding, the submissions and the grounds of judgment of the learned deputy registrar (who sits as sessions court judge), there was no explanation on the inconsistency regarding the correct month and place of when and where both the incidents took place as stated in the police report and the two charges.

[40] Through the evidence of PW2, the act of sodomy happened for many times since he came to know the appellant in 2013 until the alleged incident in October 2016. He testified that he was sodomised by the appellant in 2013, 2014, 2015 and 2016. The irony is that the police report was only lodged in December 2016, some two months after the last incident in October 2016 as alleged.

[41] PW2 was also uncertain with the time and place where the incident of the alleged sodomy when he testified that the incident in October 2016 happened at the appellant's house followed by his police report exh P2 whereas the actual place was in the school as per the second charge in this second appeal. Further, PW2 agreed when it was suggested to him that the last incident of sodomy happened in March 2016 (see p 34 lines 9–11) after he had already agreed earlier that the last incident happened in October 2016 which is supported by his police report exh P2. This contradiction has not also been explained.

[42] As opposed to the first appeal, in this second appeal, there was a medical report tendered and marked as exh P1 and the medical officer Dr Syahrir Sukarno bin Mohd Fadzil (PW1) was called to testify for the prosecution. In his medical report exh P1, PW1 stated that PW2 alleged the incident of sodomy took place in or about a year duration and lasted in October 2016. The

contents of exh P1 is as follows:

> Sejarah (History):
>
> Patient alleged was sodomised by his teacher on multiple occasions. The act was carried out for about a year duration with the last incident in October 2016. He claims that the perpetrator had initiated the act while the patient was sleeping in the perpetrator's house. He claims that there was anal penetration with the perpetrator's penis. He also claims the perpetrator had ejaculated.
>
> The estimated duration of the act lasts for about 2 minutes. He claimed that he had put up a struggle. Oral penetration was attempted. There was no bleeding post penetration but he did felt pain.

[43] Taking the evidence of PW1 on the period of time of the alleged sodomy as stated in his medical report, it must have taken place from between October 2015–2016 which is a one-year duration. This is contrary to PW2's testimony that it happened since 2013. PW2 even denied that he ever told PW1 regarding the number of times that he was sodomised as it was Insp Hasdiyanti bt Kasdi ie the investigating officer (PW5) who spoke with PW1 at all times (p 54 lines 2–7 of the notes of proceeding). However, PW1 testified that he had taken the statements from PW2 himself when PW2 came to Tawau Hospital for the medical examination (p 7 lines 18–19 of the notes of proceeding).

[44] On how many times it happened in 2013, PW2 gave contradictory and inconsistency answers. First, he said he was sodomised one time, then ten times both in school and at the appellant's house. Later he said all the ten times, the sodomy took place at the appellant's house (p 38 lines 1–26 of the notes of proceeding). Finally, he said there was one incident in school at day time in 2013 where the appellant merely rubbed his private part onto him and no penetration (p 40 lines 7–9 of the notes of proceeding).

[45] Similarly, for the incident in 2014, at first, PW2 testified that he was sodomised for less than five times, then he later changed his evidence to more than ten times.

[46] Lastly, PW2 made a sweeping statement that he was sodomised for more than ten times in 2013, 2014 and 2015 (p 43 lines 7–15 of the notes of proceeding) without mentioning the particular months in those years.

[47] For 2016, when it was suggested to PW2 that he was sodomised one or two times by the appellant, he simply answered 'more or less' (p 37 lines 1–5 of the notes of proceeding). Earlier on, PW2 testified he was sodomised for five times in October 2016 and all these incidents took place at the appellant's house (p 36 lines 1–24 of the notes of proceeding).

[48] From the prosecution's evidence, it is pertinent to note that the alleged sodomy in October 2016 happened in the school during the motivation camp from 30 September–2 October 2016 (three days and two nights). If there is any truth that the sodomy in October 2016 as per the second charge took place in the school (contrary to PW2's report exh P2 stated that the alleged sodomy happened at the appellant's house), it can only happen on the night of 1 October 2016 between 7–12pm. It cannot, therefore, happen for more than one time in October 2016 as alleged by PW2 abovementioned.

[49] PW2 testified that he was threatened by the appellant not to tell anyone of the alleged sodomy in the presence of his three friends who were also victims but none of them was called to testify.

[50] I do realise that those minor inconsistencies can be sometimes forgiven but in this second appeal, I found that there are big gaps in the prosecution case and the benefit of the doubts should be given to the appellant.

[51] Further, under the law, I am duty bound to evaluate the whole evidence after the conclusion of the case to determine whether the prosecution had established the charge against the appellant beyond reasonable doubts. I therefore found that the allegation of sodomy against the appellant in this second appeal could not stand as it was tainted with doubts.

[52] Last but not least, from the notes of proceedings, I cannot ignore the impropriety of the trial court in refusing the request made by the appellant for a postponement in the absence of his counsel during defence case. It could not be said, therefore, the appellant had been properly defended by his lawyer of his choice when he gave evidence at the defence stage regardless of whether he agreed to proceed or otherwise in the absence of his counsel.

[53] In the circumstances, this second appeal is also allowed. The conviction and sentencing by the learned deputy registrar sitting as a sessions court judge are to be set aside as well.

CONCLUSION

[54] Both appeals ie the first appeal No TWU-42A AC-1/11 of 2018 and the second appeal No TWU-42A AC-2/11 of 2018 are allowed. The appellant to be discharged forthwith.

Both appeals allowed; conviction and sentence by SCJ set aside; appellant discharged.

Reported by Nabilah Syahida Abdullah Salleh